



FEB 19 2002

In re

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:  
: DECISION ON  
: PETITION FOR REGRADE  
: UNDER 37 CFR 10.7(c)  
:

**MEMORANDUM AND ORDER**

(petitioner) petitions for regrading his answers to questions 2, 18, 21, 25, 30, 32, 17, 26, 39, 42, 28, 35, 45, and 34 of the morning section and questions 1, 24, 46, 14, 19, 36, 41, 47, and 12 of the afternoon section of the Registration Examination held on April 18, 2001. The petition is denied to the extent petitioner seeks a passing grade on the Registration Examination.

**BACKGROUND**

An applicant for registration to practice before the United States Patent and Trademark Office (USPTO) in patent cases must achieve a passing grade of 70 in both the morning and afternoon sections of the Registration Examination. Petitioner scored 49. On June 14, 2001, petitioner requested regrading, arguing that the model answers were incorrect.

As indicated in the instructions for requesting regrading of the Examination, in

order to expedite a petitioner's appeal rights, a single final agency decision will be made regarding each request for regrade. The decision will be reviewable under 35 U.S.C. § 32. The Director of the USPTO, pursuant to 35 U.S.C. § 2(b)(2)(D) and 37 CFR 10.2 and 10.7, has delegated the authority to decide requests for regrade to the Director of Patent Legal Administration.

### **OPINION**

Under 37 C.F.R. § 10.7(c), petitioner must establish any errors that occurred in the grading of the Examination. The directions state: " No points will be awarded for incorrect answers or unanswered questions." The burden is on petitioners to show that their chosen answers are the most correct answers.

The directions to the morning and afternoon sections state in part:

Do not assume any additional facts not presented in the questions. When answering each question, unless otherwise stated, assume that you are a registered patent practitioner. The most correct answer is the policy, practice, and procedure which must, shall, or should be followed in accordance with the U.S. patent statutes, the PTO rules of practice and procedure, the Manual of Patent Examining Procedure (MPEP), and the Patent Cooperation Treaty (PCT) articles and rules, unless modified by a court decision, a notice in the Official Gazette, or a notice in the Federal Register. There is only one most correct answer for each question. Where choices (A) through (D) are correct and choice (E) is "All of the above," the last choice (E) will be the most correct answer and the only answer which will be accepted. Where two or more choices are correct, the most correct

answer is the answer that refers to each and every one of the correct choices. Where a question includes a statement with one or more blanks or ends with a colon, select the answer from the choices given to complete the statement which would make the statement true. Unless otherwise explicitly stated, all references to patents or applications are to be understood as being U.S. patents or regular (non-provisional) utility applications for utility inventions only, as opposed to plant or design applications for plant and design inventions. Where the terms "USPTO" or "Office" are used in this examination, they mean the United States Patent and Trademark Office.

No credit has been awarded for morning questions 2, 18, 21, 25, 30, 32, 17, 26, 39, 42, 28, 35, 45, and 34 and afternoon questions 1, 24, 46, 14, 19, 36, 41, 47, and 12.

Petitioner's arguments for these questions are addressed below.

Petitioner did not present any reasons why his answers to the question listed above are correct. Instead, petitioner states that the following federal register notices were disproportionately tested:

1. "Request for Continued Examination Practice and Changes to Provisional Application Practice; Final Rule," 65 F.R. 50092 (Aug. 16, 2000), 1238 O.G. 13 (Sept. 5, 2000);
2. "Changes to Implement The Patent Business Goals, Final Rule," 65 F.R. 54604 (September 8, 2000), 1238 O.G. 77 (Sept. 19, 2000);
3. "Changes to Implement Eighteen-Month Publication of Patent Applications; Final Rule," 65 FR 57024 (Sept. 20, 2000), 1239 O.G. 63 (Oct. 10, 2000); and
4. "Changes to Implement Patent Term Adjustment Under Twenty-Year Patent Term; Final Rules" 65 FR 56366, (Sept. 18, 2000), 1239 O.G. 14 (Oct. 3, 2000).

Petitioner states that he was not aware of the rule changes when taking the examination and argues that by regrading the petitioner's examination without counting these questions, he would have a passing score.

Petitioner's arguments have been fully considered but are not persuasive. The instructions of the examination clearly stated "The most correct answer is the policy, practice, and procedure which must, shall, or should be followed in accordance with the U.S. patent statutes, the PTO rules of practice and procedure, the Manual of Patent Examining Procedure (MPEP), and the Patent Cooperation Treaty (PCT) articles and rules, unless modified by a court decision, a notice in the Official Gazette, or a notice in the Federal Register." (Emphasis added.) These final rules were published in the Official Gazette and the Federal Register, thus the correct answers to the questions must be consistent with these final rules. Furthermore, a notice for the scope of the April 18, 2001 Examination was posted on the USPTO web site at <http://www.uspto.gov/web/offices/dcom/olia/oed/index.html>, which included these rule changes. A copy of the notice is attached. Thus, a reasonable person would have known to answer all questions in accordance with these final rules. 37 CFR 10.7(c) requires that any applicant requesting regrading shall particularly point out the errors which the applicant believed occurred in the grading of his examination. Petitioner did not meet the required showing. Accordingly, no error in grading has been shown. Petitioner's request for credit on these questions are denied.

**ORDER**

For the reasons given above, no point has been added to petitioner's score on the Examination. Therefore, petitioner's score is 49. This score is insufficient to pass the Examination.

Upon consideration of the request for regrade to the Director of the USPTO, it is ORDERED that the request for a passing grade on the Examination is denied.

This is a final agency action.

A handwritten signature in black ink, appearing to read 'R. Spar', is positioned above a horizontal line.

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Robert J. Spar  
Director, Office of Patent Legal Administration  
Office of the Deputy Commissioner  
for Patent Examination Policy